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Sent via E-mail to All CWF Hearing Participants

Mr. Michael Lauffer, Chief Counsel  
Office of the Chief Counsel  
State Water Resources Control Board  
[Michael.Lauffer@waterboards.ca.gov](mailto:Michael.Lauffer@waterboards.ca.gov)

**Re: Action Requested on Ex Parte Communications Occurring during WaterFix Hearing**

Documents obtained by Patrick Porgans/Associates (P/A), attorney Michael Brodsky, et al, via Public Records Act requests, indicate extensive ex parte communications between the SWRCB's California WaterFix Team and the Department of Water Resources (DWR). The full extent, depth, and substance, of such communications are as-of-yet, unknown, because the Office of Chief Counsel has not responded fully to Porgans/Associates' or other WaterFix hearing parties' Public Records Act requests. Albeit, there appears to be enough evidence to indicate that the ex parte communications have impeded Protestants' due process rights, and may constitute a violation(s) of the Administrative Procedure Act (California Government Code, section 11340 et seq) and/or common law principles of judicial ethics.

While CEQA requires that, as a responsible agency, the SWRCB must "respond to consultation by the lead agency in order to assist the lead agency in preparing adequate environmental documents for the project" (14 Cal. Code Regs., § 15096, subd. (b)), nothing requires the consultation to be done entirely in secret with the Hearing Team during an adjudicatory hearing, especially when the adequacy of the environmental impact analysis is a major hearing issue. While CEQA requires that the SWRCB staff must attend meetings with DWR to "discuss the scope and content" of DWR's WaterFix EIR, nothing requires these meetings to

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1 held in secret with the Hearing Team, and without notice to any of the WaterFix hearing parties.  
2 And certainly nothing requires that communications with the SWRCB about these meetings be  
3 withheld from WaterFix hearing parties when requested or subpoenaed.

4 The following pages have verbatim excerpts contained in a letter from you to the State  
5 Water Resources Control Board (SWRCB) and the State and Regional Water Quality Control  
6 Boards, regarding the consequences of the transmittal of ex parte communications in an  
7 adjudicative proceeding. More specifically, Patrick Porgans/Associates (P/A) are interested in  
8 answers to the question “**What are the consequences of violating the ex parte**  
9 **communications prohibition?**”

10 **Patrick Porgans/Associates (P/A) requests the following actions from the Chief Counsel:**

- 11 • Respond fully to all Public Records Act Requests for ex parte communications
- 12 • Ascertain if the ex parte communications were compliant with SWRCB policies,  
13 procedures, and the Administrative Procedure Act.
- 14 • Determine if the ex parte communications impeded or violated Protestants’ due process  
15 rights.
- 16 • Determine if the ex parte communications necessitate additional proceeding for an  
17 opportunity to disclose and address the content and issues contained therein.

18 In light of the fact that ex parte communications have been ongoing since 2016, and that the  
19 SWB WaterFix is currently in Phase 2, P/A would appreciate an expedited response to this  
20 correspondence. Thank you for your time and interest in this crucial matter of public concern  
21 and the due process rights of the Protestants participating in the WaterFix Hearing.

22  
23 Sincerely,  
24 *Patrick Porgans*  
25 Patrick Porgans, Solutionist

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## Excerpts from Ex Parte Questions and Answers<sup>1</sup>

Rules regarding ex parte communications have their roots in constitutional principles of due process and fundamental fairness. With public agencies, ex parte communications rules also serve an important function in providing transparency. Ex parte communications may contribute to public cynicism that decisions are based more on special access and influence than on the facts, the laws, and the exercise of discretion to promote the public interest. [Emphasis added]

Ex parte communications are fundamentally offensive in adjudicative proceedings because they involve an opportunity by one party to influence the decision maker outside the presence of opposing parties, thus violating due process requirements. Such communications are not subject to rebuttal or comment by other parties. Ex parte communications can frustrate a lengthy and painstaking adjudicative process because certain decisive facts and arguments would not be reflected in the record or in the decisions. Finally, ex parte contacts may frustrate judicial review since the record would be missing such communications.

### 3. Q. What purposes are served by limitations on ex parte communications?

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### 52. Q. Who is responsible for complying with the ex parte rules – the board members or the public?

There is a shared responsibility for complying with the ex parte communications prohibition of the Administrative Procedure Act. Water board members are expected to know the rules and remain vigilant in their application of the rule. **If a person attempts to violate the prohibition on ex parte communications, the board member should be prepared to stop the communication, because of the risk the communication could result in disqualification of the board member.** [Emphasis added]

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<sup>1</sup> Michael A.M. Lauffer, Chief Counsel, Office of the Chief Counsel, State Water Resources Control Boards, Subject: TRANSMITTAL OF EX PARTE COMMUNICATIONS QUESTIONS AND ANSWERS, 25 April 2013, sent via e-mail

1 Persons participating in adjudicative proceedings also have an obligation to understand and follow  
2 the rules, particularly attorneys and professional lobbyists. As discussed in Question  
3 **25, in egregious circumstances violating the prohibition on ex parte communications can**  
4 **subject a person to civil contempt proceedings.** [pp. 19 and 20]

## 6 **E. Consequences of Prohibited Ex Parte Communications**

### 7 **25. Q. What are the consequences of violating the ex parte communications prohibition?**

8  
9 Prohibited ex parte communications can have a number of consequences. First, board members  
10 must disclose a prohibited ex parte communication on the record and the board may be required  
11 to hear comments or additional evidence in response to the ex parte communication. Second, a  
12 prohibited ex parte communication may be grounds for disqualifying the board member from  
13 participating in the adjudicative proceeding. Third, a prohibited ex parte communication could be  
14 used as a basis for a subsequent legal challenge to the board's adjudicative action, especially if  
15 the communication is not properly disclosed and the board member participates in the proceeding.  
16 The Administrative Procedure Act also authorizes a water board to sanction a person violating  
17 the prohibition on ex parte communications, although this is likely to be used only for egregious  
18 or recurring violations. [p. 10]

### 20 **26. Q. How may a board member cure an inadvertent ex parte communication?**

21  
22 The Administrative Procedure Act provides explicit procedures that a board member is required  
23 to follow if there has been an ex parte communications. These procedures do not subsume the  
24 rule or provide a mechanism for circumventing the Legislature's prohibition on ex parte  
25 communications in adjudicative proceedings.

26  
27 **In the event of receiving a prohibited ex parte communication, the water board member**  
28 **must disclose the communication on the record. Disclosure requires either (1) including a**  
29 **written ex parte communication in the record, along with any response from the board**  
30 **member, or (2) memorializing an oral communication by including a memorandum in the**  
31 **record stating the substance of the communication, identifying who was present at the**  
32 **time of the communication, and any response from the board member. The board member**  
33 **must notify all parties of the ex parte disclosures. Additional proceedings may be**  
34 **necessary if a party timely requests an opportunity to address the disclosure. (p. 11)**  
35 [Emphasis added]

36  
37 **In the event a board member receives what may be a prohibited ex parte communication,**  
38 **it is important to work with legal counsel to determine whether the communication is**  
39 **indeed prohibited, and, if the communication is prohibited, that it is disclosed as required**  
40 **by the Administrative Procedure Act. (p. 11). [Emphasis added]**  
41  
42